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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In Re C.O., A Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.O.,

Defendant and Appellant.

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E058173

(Super.Ct.No. SWJ009385)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,
Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, Carole A. Nunes Fong, Deputy County
Counsel, for Plaintiff and Respondent.

J.O. (Father) appeals after the termination of his parental rights to C.O. at a Welfare and Institutions Code section 366.26¹ hearing. Father makes one claim on appeal that the juvenile court erred by denying his section 388 petition. We affirm the juvenile court's order denying Father's section 388 petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Detention*

On June 22, 2012, at 35 weeks gestation, K.O. (Mother) prematurely gave birth to C.O.² C.O. was transferred to the Neonatal Intensive Care Unit (NICU) due to mild respiratory distress, hypoglycemia, hypothermia and difficulties feeding. His feeding difficulties required him to stay in the NICU for four to five days. C.O. tested positive for methamphetamines and/or amphetamines.

Father had visited C.O. at the hospital. Mother's drug test, completed 48 hours after she was admitted to the hospital, was negative and she adamantly denied any drug use.

Father refused to speak with the social worker from the Department of Public Social Services (Department). Father had an extensive criminal history of convictions for being under the influence of a controlled substance. He also had several active cases

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother has not filed an appeal. We only briefly mention the dependency action as it pertains to her.

involving possession of drug paraphernalia and controlled substances occurring in March, April and May of 2012.

It was recommended by the Department that C.O. be detained from Father and Mother. Upon discharge of C.O. from the NICU, he was to be placed with the maternal grandmother (Grandmother).

Due to severe neglect and their drug use, Mother and Father had lost their parental rights to C.O.'s two older siblings on July 14, 2010. They failed to complete substance abuse treatment and all other services in this prior case. Their parental rights to C.O.'s two older siblings were terminated and they were adopted by Grandmother.

On July 2, 2012, a section 300 petition was filed by the Department on behalf of C.O. and against Father and Mother. It alleged against Mother, under section 300, subdivision (b), that she abused controlled substances while pregnant and her abuse limited her ability to care for C.O. Regarding Father, the petition alleged he had an extensive history of abusing controlled substances and a criminal history of drug-related arrests. It was also alleged that Father and Mother had a history with the Department resulting in termination of their parental rights regarding two other children.

At a detention hearing held on July 3, 2012, the juvenile court found a prima facie case and ordered C.O. detained.

B. *Jurisdictional/Dispositional Report and Hearing*

In a jurisdictional/dispositional report filed on July 20, 2012, the Department recommended that Father be denied reunification services pursuant to section 361.5, subdivisions (b)(10) and (b)(11). It was also recommended that C.O. remain detained

with Grandmother. Father had given money and baby items to Grandmother for C.O. Attorneys representing both Mother and Father would not allow them to make statements to the Department regarding the allegations in the section 300 petition.

Grandmother stated that Mother started using methamphetamine when she was 17 years old, but Grandmother believed she had not used methamphetamine since March of 2012. Regarding Father, Grandmother believed he started using methamphetamine at the age of 13 years, and was still consistently using drugs. He had a pending criminal court hearing on July 27, 2012, regarding the four pending charges of possession of a controlled substance. Grandmother had consistently cared for C.O.'s older siblings since she adopted them in 2009. Mother tested positive for methamphetamine on July 11, 2012. Grandmother advised the Department that Mother and Father had been together for six years. Father wanted to reunify with C.O. Grandmother was willing to adopt C.O. C.O. had been eating well and was developing normally. Father had failed to appear for a drug test on July 11, 2012, and refused a saliva test. Father had not contacted the Department regarding the missed test.

Father had visits with C.O. on three occasions. Grandmother stated the visits were "favorable." Father claimed to be considering entering a six-month, inpatient substance abuse treatment program in order to avoid a prison term for his pending criminal charges. Father had failed to complete any of the offered reunification services during his attempt to reunify with C.O.'s older siblings.

An addendum report was filed on August 31, 2012. C.O. was continuing to thrive in Grandmother's care. Father had been consistently visiting C.O., approximately four

times a week, and the visits were favorable. Father's criminal cases had been continued to September 5, 2012. Mother had falsified drug test results and submitted them to the Department. Grandmother reported that C.O.'s older siblings were very attached to C.O.

The jurisdictional/dispositional hearing was conducted on September 7, 2012. The petition was amended as to the allegations against Mother. Father submitted on the allegations of the petition for jurisdictional purposes. Father requested that reunification services be granted. Father was entering the "ROC" program pursuant to the criminal court disposition.³ The juvenile court found the allegations in the amended petition true. Father was denied reunification services. The juvenile court commended Father for entering the ROC program, but stated, ". . . I cannot find recent entry into that program constitutes reasonable efforts to address the issues that led to the prior termination of services and parental rights." A section 366.26 hearing was set. Visitation was continued.

C. *Section 366.26 Report*

On December 19, 2012, the Department filed a report for a section 366.26 hearing. It was recommended that Father's parental rights be terminated. The permanent plan for C.O. was adoption by Grandmother.

C.O. continued to develop normally and was a happy baby. Father had not been visiting because he was in the ROC program. Grandmother was willing to continue

³ ROC is an acronym for the Recovery Opportunity Center.

visitation between Mother, Father, and C.O., both before and after completion of the adoption, and as long as Mother and Father remained sober. C.O. had a strong attachment to Grandmother.

On January 18, 2013, the Department filed an addendum report. The recommendation remained the same. Father was living in a halfway house. Father had been given a choice by the criminal court to either spend four years in prison or go into a drug rehabilitation program; he chose drug rehabilitation. The Department commented that it appeared Father only went to drug treatment to avoid prison and his recovery was “questionable.” As far as the Department was aware, Father was not employed and had no income. During visitation, Father played with C.O.’s older siblings and had little interaction with C.O. There was no evidence of a bond between C.O. and Father. C.O. was bonded to his siblings and Grandmother.

D. *Section 388 Petition*

On January 22, 2013, Father filed his section 388 petition. He claimed his changed circumstances were that he completed an inpatient drug treatment program, anger management classes, and a parenting class. He was in an outpatient drug treatment program. He was employed and had stable housing. Father submitted a certificate of completion of the inpatient ROC program. He also submitted certificates of completion of an eight-week anger management course, and a parenting course. Father also submitted verification that he was enrolled in the outpatient ROC program. The program would last between 18 and 24 months. Father would be subject to drug testing. Father submitted a letter from a realty company that he was employed as a janitor and performed

clerical duties. He further submitted a letter affirming he was living in a sober-living facility.

Father requested that he be granted reunification services. Father had maintained consistent visitation. He loved C.O. and was in a good position to be a good father to C.O.

E. *Section 366.26 and 388 Hearings*

The section 366.26 hearing and the hearing on the section 388 petition were heard together on January 24, 2013. The trial court denied Father's section 388 petition, as will be explained in more detail, *post*. The parental rights of Mother and Father were terminated and C.O. was freed for adoption.

II

SECTION 388 PETITION

Father complains the juvenile court erred by denying his section 388 petition.

A. *Additional Factual Background*

At the hearing on the section 388 petition, Father's counsel argued that Father changed his circumstances, and the court should consider that he had participated in several programs. Father's counsel outlined the programs Father had completed. Further, Father had maintained consistent visitation. Father's counsel admitted that in the prior dependency, Father had not made any effort to reunify, but he was working hard to reunify with C.O.

The Department objected, arguing that Father's progress was due to his choice to stay out of prison on the criminal charges. Further, due to his long-time drug use, several

weeks of sobriety showed only “changing” circumstances, not “changed” circumstances. It was not in the best interests of C.O. to delay adoption by Grandmother. Father did not have a bond with C.O. and he would suffer a detriment if separated from his siblings.

The trial court first noted that the dependency regarding C.O. did not occur in a vacuum. Father had a prior history with the Department and had lost two other children. Further, C.O. had been in Grandmother’s custody his entire life. She was the only parent that he knew and he was placed with his siblings. The trial court noted that Father was very candid that he had an extensive drug history and that on the surface he seemed as though he was committed to his sobriety. However, it was only a baby step in the process. Completing the inpatient program and starting the outpatient program was the beginning of a process to change his circumstances. The juvenile court ruled, “. . . I cannot find there is a change of circumstances that would lead me to change the current court order that had denied [Father] services.”

Father had not taken an active parental role and failed to show that a change of the court order would be in C.O.’s best interests. C.O. considered Grandmother as his parental figure. It would be detrimental to C.O. to stop the adoption process and grant Father reunification services. The section 388 petition was denied.

B. *Analysis*

“Section 388 allows a person having an interest in a dependent child of the court to petition the court for a hearing to change, modify, or set aside any previous order on the grounds of change of circumstance or new evidence.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250). “[S]pecific allegations describing the evidence constituting the

proffered changed circumstances or new evidence' is required. [Citation.]" (*Ibid.*) It "shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction." (§ 388, subd. (a).) "There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, 1081 [Fourth Dist., Div. Two] [summary denial of § 388 petition was proper where there was no showing of how the children's best interests would be served by depriving them of a permanent, stable home in exchange for an uncertain future].)

"We review the juvenile court's summary denial of a section 388 petition for abuse of discretion." (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) A section 388 petition is addressed to the sound discretion of the juvenile court, and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Father was denied reunification services due his extensive criminal history and drug use. Father insisted that his completion of the inpatient drug treatment program was evidence that he had changed his circumstances and was entitled to reunification services. While Father was commended by the juvenile court for completing the program, it was only a baby step in the process of recovery. Even a showing of great effort to make improvements will not necessarily be persuasive when a parent has an extensive history of drug use. (*In re C.J.W.*, *supra*, 157 Cal.App.4th at p.1081 [affirming the denial of a

section 388 petition when the parents' efforts at drug rehabilitation were only three months old at the time of the section 366.26 hearing]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47-48 [affirming the denial of a section 388 petition when the mother with an extensive history of drug use had been drug free for only a few months and had not completed her treatment program]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206 [mother's very recent treatment for drug abuse and bipolar disorder was not even a prima facie case of changing circumstances].)

Father had been using methamphetamine since he was 13 years old. He continued to use drugs as evidenced by his numerous arrests for possession of controlled substances in March, April, and May 2012, which was just prior to C.O.'s birth. Father was forced into treatment in order to avoid being sent to prison. He did not enter the program immediately but rather waited several months after the dependency process was initiated. Although he apparently had done well in the program, he was only in the beginning stage of the process. Father was able to show only that his circumstances were changing, not that they had changed within the meaning of section 388. Thus, the juvenile court did not abuse its discretion in determining he had failed to establish his circumstances had changed for purposes of section 388.

Moreover, it was not in C.O.'s best interest to grant the section 388 petition. C.O. had been with Grandmother since his birth and had a strong bond with her. C.O. was living with his older siblings, they were all bonded, and Grandmother was committed to keeping the three together. Father had not shown any type of parental bond with C.O. despite several visitations with him. Grandmother agreed to allow Father visitation as

long as he remained sober. The juvenile court did not abuse its vast discretion in determining that C.O.'s best interest was to be adopted by Grandmother.

Accordingly, we reject Father's argument that the court erred in denying his section 388 petition.

III

DISPOSITION

The juvenile court's orders are affirmed.

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RICHLI
J.

We concur:

MCKINSTER
Acting P. J.

MILLER
J.